

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1246 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? Yes to the learned Trial Magistrate wherever he is, if in service.

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STATE OF GUJARAT

Versus

HANIFBHAI VALIBHAI NEDARIYA

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Appearance:

Shri S.T.Mehta, Additional Public Prosecutor, for the Appellant - State.

Shri M.J.Buddhabhatti, Advocate, for the Respondents - accused (appointed).

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 08/10/96

ORAL JUDGEMENT

The judgment and order of acquittal passed by the learned Chief Judicial Magistrate of Banaskantha at Himatnagar on 14th September 1992 in Criminal Case No.685

of 1991 is under challenge in this appeal by leave of this court under Section 378 of the Code of Criminal Procedure, 1973 (the Code for brief). Thereby the learned trial Magistrate acquitted the respondents herein of the offence punishable under Section 16 (1-A) (i) of the Prevention of Food Adulteration Act, 1954 (the Act for brief).

2. The facts giving rise to this appeal move in a narrow compass. Respondent No.1 herein has his grocery shop situated at Mehtapura, Opposite Bus Stand in Himatnagar. He was inter alia selling turmeric powder in sealed packets. One Yogeshchandra Madhusudan Soni (the complainant for convenience) was appointed as the Food Inspector for the local limits of Himatnagar. He visited the shop of respondent No.1 herein on 18th December 1990 at about 11.45 a.m. with his helper. He got one packet of turmeric powder contained in a plastic bag broken open and purchased from it 450 gms. thereof. The sample was divided in three equal parts. After complying with the necessary formalities, one sample was sent to the Public Analyst at Rajkot for its analysis and two samples were sent to the local health authority at Gandhinagar by registered post. This was done in accordance with the relevant rules framed under the Act. The Public Analyst at Rajkot appears to have analysed the sample on 1st January 1991 and has prepared his report thereof on 15th January 1991. It was found to be containing both living and dead insects about more than fifty in number. Its copy is at Exh.30 on the record of the trial court. It may be mentioned at this stage that, in the course of purchasing sample from respondent No.1 herein, it was disclosed that the article of food was purchased from respondent No.2 on 6th July 1990 under a bill and the necessary information regarding packing of the packet was found in the plastic bag itself. A copy of the bill of purchase is at Exh.13 on the record of the trial court. Thereupon, the necessary particulars under Section 14-A of the Act were gathered by the complainant. On receipt of the report from the Public Analyst at Rajkot, the complainant moved the authority for the purposes of Section 20 of the Act and, by the order passed on 21st March 1991, the complainant was required to launch prosecution against the respondents herein. Its copy is at Exh.31 on the record of the trial court. Thereafter, the complainant filed his complaint in the Court of the Chief Judicial Magistrate of Banaskantha at Himatnagar on 8th April 1991. Thereafter, the complainant gave the required notice under Section 13 (2) of the Act to both the respondents herein on 18th April 1991. The complaint filed by the complainant came to be registered as

Criminal Case No.685 of 1991. The charge against the respondents as accused was framed on 18th June 1992 at Exh.45 on the record of the trial court charging them with the offence punishable under Section 16 (1-A) (i) of the Act. Neither respondent - accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused and after hearing the arguments, by his judgment and order passed on 14th September 1992 in Criminal Case No.685 of 1991, the learned Chief Judicial Magistrate of Banaskantha at Himatnagar acquitted both the respondents herein of the charge levelled against them. That aggrieved the prosecution agency. It has therefore by leave of this court invoked its appellate jurisdiction under Section 378 of the Code for questioning the correctness of the aforesaid judgment and order of acquittal passed by the learned trial Magistrate.

3. Learned Additional Public Prosecutor Shri Mehta for the appellant - State has taken me through the entire evidence on record in support of his submission that the impugned judgment and order of acquittal cannot be sustained in law. He has further submitted that the learned trial Magistrate ought to have held that the prosecution could bring the guilt home to the accused beyond any reasonable doubt.

4 It may be mentioned that, though duly served, neither respondent - accused appeared in person or through any advocate. Learned Advocate Shri M.J.Buddhabhatti was therefore appointed by this court to represent both the respondents herein for the purpose of this appeal.

5. In reply to the aforesaid submissions urged before me by learned Additional Public Prosecutor Shri Mehta for the appellant - State, learned Advocate Shri Buddhabhatti for the respondents - accused has urged that respondent No.1 cannot be held guilty in view of Section 19 of the Act. Learned Advocate Shri Buddhabhatti for the respondents has further urged that the learned trial Magistrate has rightly acquitted the respondents accused on the ground that the report of the Public Analyst at Exh.30 on the record of the case did not show that the article of food was unfit for human consumption. Learned Advocate Shri Buddhabhatti for the respondents- accused has further urged that the notice under Section 13 (2) of the Act was given to the respondents - accused herein after the expiry period of six months prescribed for the use of the turmeric powder in the packet, and as such the

respondents - accused have been denied the right of the other samples got tested by the Central Food Laboratory. It has also been urged by learned Advocate Shri Buddhahatti for the respondents - accused that the learned trial Magistrate was justified in not finding packing of the samples in a duly cleaned container. In that view of the matter, runs the submission of learned Advocate Shri Buddhahatti for the respondents - accused, the respondents have rightly earned their acquittal from the trial Magistrate.

6. So far as the finding regarding not using of cleaned containers by the Food Inspector for packing the samples of turmeric powder is concerned, it cannot be sustained in law. The reason therefor is quite simple. Simply because the panch witness at Exh.50 says that cleaned containers were not shown to him would not be a ground to disbelieve the complainant's evidence in that regard, more particularly when the former turned hostile to the prosecution. Even if the panch witness has turned hostile, that would not discredit the complainant's evidence if it is found to be otherwise reliable and trustworthy. I have been taken through the oral testimony of the complainant at Exh.10 on the record of the trial court. It is found to be quite reliable and trustworthy. He has stood to his ground well in his cross-examination. In that view of the matter, there is no reason to disbelieve his deposition with respect to use of the cleaned containers by him for packing the samples of turmeric powder purchased from respondent No.1 herein on 18th December 1990.

7. The learned trial Magistrate's conclusion that the Public Analyst in his report at Exh.30 has not opined the sample to be unfit for human consumption is an outcome of misreading of his opinion. The opinion of the Public Analyst in his report at Exh.30 is to the effect that, as the sample of turmeric powder was heavily infested with insects, it was adulterated as per Section 2 (ia) (a) of the Act. The description of the sample powder was found to be heavily infested with living and dead insects and larvae and it was found to be containing more than 50 (fifty) living and dead grain-moths and larvae.

8. It would be quite proper at this stage to look at the relevant portion of the definition of the term "Adulterated" contained in Section 2 (ia) (f) of the Act. It has been provided therein that an article of food shall be deemed to be adulterated if the article consists wholly or in part of any filthy, putrid, rotten,

decomposed or diseased animal or, vegetable substance or is insect-infested or is otherwise unfit for human consumption.

9. In this connection, a reference deserves to be made to the binding ruling of the Supreme Court in the case of MUNICIPAL CORPORATION OF DELHI v. TEK CHAND BHATIA reported in AIR 1980 Supreme Court at page 360. The expression "or it is otherwise unfit for human consumption" occurring in the aforesaid provision contained in the definition clause of the Act has been held to be read disjunctively and it was held to be a residuary provision. In that case, the sample of cashew nuts was proved to be insect-infested. In that context, the Apex Court held that no further proof that the article was unfit for human consumption was necessary.

10. The aforesaid ruling of the Supreme Court is binding to this court. It is on all fours applicable in the present case. As pointed out hereinabove, the report of the Public Analyst at Exh.30 on the record of the trial court quite clearly shows the sample to be insect-infested. It was found to be containing more than 50 living and dead grain-moths and larvae. In that view of the matter, the sample in question could be said to be adulterated within its meaning contained in Section 2 (ia) (f) of the Act. The contrary conclusion reached by the learned trial Magistrate cannot be upheld in law in view of the aforesaid binding ruling of the Supreme Court.

11. The learned trial Magistrate has also given the benefit of doubt to the respondents herein on the ground that the notice under Section 13 (2) of the Act was served to them more than six months after the article of food in question was first sold by respondent No.2 herein to respondent No.1 on 6th July 1990 in terms of the bill at Exh.13 on the record of the trial court. Learned Advocate Shri Buddhabhatti for the respondents - accused has submitted that the slip contained an inscription and the expiry period for use of the contents of the plastic bag was six months. In that view of the matter, learned Advocate Shri Buddhabhatti for the respondents - accused has submitted that they have been denied an opportunity to get the second sample tested by the Central Food Laboratory as the notice under Section 13 (2) of the Act was served six months thereafter on 18th April 1991.

12. It is true that Rule 9-A of the Prevention of Food Adulteration Rules, 1955 (the Rules for brief) requires service of the notice under Section 13 (2) of

the Act within ten days from institution of the prosecution against the accused. No grievance could be made regarding non-compliance therewith. The complaint was lodged in the Court of the Chief Judicial Magistrate at Himatnagar on 8th April 1991. The notice under Section 13 (2) at Exh.34 on the record of the trial court was sent on 18th April 1991, very much within ten days as required by Rule 9-A of the Rules. Even otherwise, in its ruling in the case of T.V.USMAN v. FOOD INSPECTOR, TELLICHERRY MUNICIPALITY reported in JUDGMENT TODAY 1994 (1) Supreme Court at page 260, the Supreme Court has held Rule 9-A of the Rules to be directory and not mandatory. Prejudice to the accused flowing from its non-compliance has to be shown to the court.

13. In the present case, neither accused has demanded the other samples to be analysed by the Central Food Laboratory on receipt of the notice at Exh.34 on the record of the trial court. It cannot be gainsaid that Section 13 (2) of the Act confers valuable right on the accused for getting the other sample examined by the Central Food Laboratory and the report of the Central Food Laboratory is made conclusive and, if it shows the sample to be unadulterated, the accused would stand benefitted thereby. If the Central Food Laboratory finds that the sample sent to it was unfit for analysis on account of passage of time, the accused would stand benefitted regarding correctness of the report of the Public Analyst on the basis of which the prosecution against him is launched. If however no sample is sent to the Central Food Laboratory, it would be difficult to assume in favour of the accused that the other samples of the article of food purchased from him by the complainant were so degenerated as had become unfit for analysis or had become insect-infested by passage of time. It is true that the complainant in his oral testimony at Exh.10 has admitted in his cross-examination that turmeric powder would be infested with insects after six months. He was however not an expert on the subject. So far as the Public Analyst at Rajkot is concerned, he examined the sample on 1st January 1991 within six months from the date of purchase thereof by respondent No.1 from respondent No.2 under the bill at Exh.13 on 6th July 1990. The sample being insect-infested was not on account of passage of time so far as the report of the Public Analyst at Exh.30 is concerned. If it was found by the Central Food Laboratory that the sample sent by it for analysis was insect-infested on account of passage of time, different considerations would have arisen. In that case, the respondents as accused could have very well pleaded that they could not get an opportunity to

verify the correctness of the Public Analyst's report. When the respondents - accused did not avail of their right to get the other samples examined by the Central Food Laboratory under Section 13 (2) of the Act, they cannot make a grievance that they were sent the report of the Public Analyst after the expiry period of six months for consumption of turmeric powder as packed in the plastic bag from which the complainant purchased the sample for the purposes of the Act and they could not therefore get the other samples tested by the Central Food Laboratory. I think the learned trial Magistrate went wayward in giving a benefit of doubt to the respondents - accused on that ground. That conclusion on his part cannot be sustained in law more particularly when Rule 9-A of the Rules has been held to be directory by the Supreme Court in its aforesaid binding ruling in the case of T.V.USMAN (supra).

14. That brings me to the question as to whether both the respondents are guilty of the offence with which they stood charged or either of them is guilty and if so who the guilty person is. It is not in dispute that respondent No.1 purchased the article of food in question from respondent No.2 in a packed plastic bag. It is again not in dispute that the complainant purchased the article of food in question from respondent No.1 from the packed plastic bag. In that view of the matter, learned Advocate Shri Buddhahatti for the respondents is right in his submission that respondent No.1 cannot be held guilty in view of Section 19 (2) of the Act. It reads:

" 19 (2) A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proves -

(a) that he purchased the article of food -

(i) in a case where a licence is prescribed for the sale thereof, from a duly licensed manufacturer, distributor or dealer;

(ii) in any other case, from any manu-

facturer, distributor or dealer,

with a written warranty in the prescribed form; and

(b) that the article of food while in his

possession was properly stored and that he sold it in the same state as he purchased it."

The conditions for claiming benefit of the aforesaid statutory provision by respondent No.1 are fully satisfied. He admittedly purchased the article of food in question from respondent No.2 in packed condition and he sold the same in the same packed condition to the complainant. Respondent No.2 is implicated in this case as a manufacturer or distributor of the article of food in question. It is nobody's case that the article of food in question while it was in possession of respondent No.1 was not properly stored. That could have been the defence of respondent No.2 herein. He has not come with that defence. In that view of the matter, respondent No.1 herein cannot be said to be guilty of the offence with which he has been charged. Since respondent No.2 has sold the article of food in question either as a manufacturer or as a distributor or as a dealer to respondent No.1 and that article of food is found to be adulterated, respondent No.2 cannot escape from his penal liability. He has to be convicted of the offence punishable under Section 16 (1-A) (i) of the Act.

15. That brings me to the question of punishment. Ordinarily, the accused has to be heard on the question of punishment. However, the minimum punishment for the offence has been prescribed and it is one year and fine of rupees two thousand. No provision is made for imposition of less than the minimum prescribed sentence. Since I propose to impose the minimum punishment on respondent No.2 as the accused convicted of the aforesaid offence, I think it would not be necessary to hear him for the purpose.

16. In the result, this appeal is accepted. The judgment and order of acquittal passed by the learned Chief Judicial Magistrate of Sabarkantha at Himatnagar on 14th September 1992 in Criminal Case No.685 of 1991 is quashed and set aside qua respondent No.2 herein. So far as respondent No.1 is concerned, his acquittal is affirmed. So far as respondent No.2 is concerned, he is convicted of the offence punishable under Section 16 (1-A) (i) of the Act and he is sentenced to rigorous imprisonment for one year and fine of rupees two thousand. A warrant for his arrest is ordered to be issued.



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